

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH SCHNEIDERMAN,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 2:14-CV-00120-JTR

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF Nos. 20, 21. Attorney Dustin D. Deissner represents Joseph Schneiderman (Plaintiff); Special Assistant United States Attorney Catherine Escobar represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 17. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) on March 2, 2009, alleging disability

1 beginning January 23, 2002. Tr. 165-71. The applications were denied initially
2 and upon reconsideration. Tr. 117-23, 134-37. Administrative Law Judge (ALJ)
3 Marie Palachuk held a hearing on June 8, 2010, at which Plaintiff, represented by
4 counsel, testified as did medical expert George W. Weilepp, M.D., and vocational
5 expert (VE) Sharon Welter. Tr. 49-104. The ALJ issued an unfavorable decision
6 on September 3, 2010. Tr. 26-42. The Appeals Council denied review. Tr. 1-4.
7 The ALJ's September 2010 decision became the final decision of the
8 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
9 405(g). Plaintiff filed this action for judicial review on April 29, 2014. ECF No.
10 1, 4.

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
14 here.

15 Plaintiff was 40 years old at the time of the hearing. Tr. 83. Plaintiff
16 obtained a GED and completed some college and trade school. Tr. 83. Plaintiff
17 previously worked in the construction, concrete, and rain gutter installation
18 industries. Tr. 83, 222. Plaintiff was also a professional bull rider from 1991 to
19 2001. Tr. 93-94.

20 In January 2002, while driving a truck during the course of his job,
21 Plaintiff's truck was blown off the road into an embankment. Tr. 283. Plaintiff
22 opened a workers' compensation claim and underwent a significant amount of
23 treatment, including physical therapy and multiple surgeries. Plaintiff had cervical
24 surgery (C4-5 anterior cervical discectomy and fusion) in September 2005, Tr.
25 294, 353-54, which initially helped his neck pain, Tr. 395. Plaintiff testified,
26 however, that two car accidents subsequent to the surgery increased his pain again.
27 Tr. 89, 493; *see also* Tr. 293, 362-63, 470-74, 489. Plaintiff had lumbar surgery
28 (L5-S1 discectomy) in April 2007. Tr. 532-33, 552. Sometime in 2007, Plaintiff

1 apparently “popped” his back while vacuuming, which increased his back pain.
2 Tr. 85, 582-83. Plaintiff participated in an outpatient pain clinic in April/May
3 2008. *See* Tr. 625-32, 834-46. Plaintiff engaged in vocational rehabilitation and
4 earned a degree from the American School of Broadcasting in 2004. Tr. 94, 96.
5 Plaintiff started doing radio work and worked as a music coordinator for local
6 sports teams. Tr. 83.

7 At the administrative hearing, Plaintiff testified that he can’t work due to
8 neck and back pain. Tr. 84. Plaintiff’s neck pain extends into his shoulders and
9 arms. Tr. 84-85, 90-91. Plaintiff’s back pain extends into his legs, which makes it
10 painful for him to sit. Tr. 85. Plaintiff also claimed to suffer from migraine
11 headaches once or twice a week. Tr. 84, 89. Plaintiff testified that he can
12 sometimes function in spite of a headache, but sometimes the headache is
13 completely debilitating and can last as long as several days. Tr. 84, 89-90.

14 Plaintiff testified that, on account of his back pain, he needs to spend about
15 ninety percent of his time on the couch. Tr. 84. Plaintiff testified that he has
16 “severe” trouble sitting, laying down, standing, and walking. Tr. 87. Plaintiff
17 testified that he can sit for approximately fifteen minutes, stand for approximately
18 five minutes, and walk for about fifteen yards. Tr. 88. Plaintiff stated he cannot
19 crouch, crawl, or squat, and can only bend at the waist when supporting himself
20 with an arm crutch. Tr. 88. Plaintiff stated he can only lift about five pounds. Tr.
21 88. Medication makes Plaintiff’s pain “bearable,” but causes drowsiness. Tr. 91.

22 Plaintiff testified that he cares for his eleven year old son and prepares
23 meals, but that his son helps with most chores around the house. Tr. 92. Plaintiff
24 testified that he can drive. Tr. 93.

25 STANDARD OF REVIEW

26 The ALJ is responsible for determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo,

1 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
2 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
3 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
4 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
5 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
6 another way, substantial evidence is such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
8 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
9 interpretation, the court may not substitute its judgment for that of the ALJ.
10 *Tackett*, 180 F.3d at 1097; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595,
11 599 (9th Cir. 1999). Nevertheless, a decision supported by substantial evidence
12 will still be set aside if the proper legal standards were not applied in weighing the
13 evidence and making the decision. *Browner v. Secretary of Health and Human*
14 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence supports the
15 administrative findings, or if conflicting evidence supports a finding of either
16 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
17 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

18 **SEQUENTIAL EVALUATION PROCESS**

19 The Commissioner has established a five-step sequential evaluation process
20 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
21 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
22 through four, the burden of proof rests upon claimants to establish a prima facie
23 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
24 burden is met once claimants establish that physical or mental impairments prevent
25 them from engaging in their previous occupations. 20 C.F.R. §§ 404.1520(a)(4),
26 416.920(a)(4). If claimants cannot do their past relevant work, the ALJ proceeds
27 to step five, and the burden shifts to the Commissioner to show that (1) the
28 claimants can make an adjustment to other work, and (2) specific jobs exist in the

1 national economy which claimants can perform. *Batson v. Comm'r of Soc. Sec.*
2 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an
3 adjustment to other work in the national economy, a finding of “disabled” is made.
4 20 C.F.R. §§ 404.1520(a)(i-v), 416.920(a)(4)(i-v).

5 ADMINISTRATIVE DECISION

6 On September 3, 2010, the ALJ issued a decision finding Plaintiff was not
7 disabled as defined in the Social Security Act.

8 Preliminary, upon the request of Plaintiff’s counsel, the ALJ amended the
9 alleged onset date from January 23, 2002, to January 1, 2006. Tr. 29. The ALJ
10 further found, however, that any amendment to the alleged onset date was
11 irrelevant due to the ALJ’s ultimate conclusion that Plaintiff was not disabled. Tr.
12 29. For purposes of Plaintiff’s DIB application, the ALJ found that Plaintiff met
13 the insured requirements through March 31, 2013. Tr. 31.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
15 activity since January 23, 2002, the alleged onset date. Tr. 31.

16 At step two, the ALJ determined Plaintiff had the following severe
17 impairments: lumbar disc disease status post lumbar laminectomy on two
18 occasions, cervical disc degeneration, possible lumbar radiculopathy, headaches,
19 and chronic pain. Tr. 31.

20 At step three, the ALJ found Plaintiff did not have an impairment or
21 combination of impairments that met or medically equaled the severity of one of
22 the listed impairments. Tr. 32. The ALJ found Plaintiff had the residual function
23 capacity (RFC) to perform sedentary work except he requires:

24 [A] sit/stand option approximately every 60 minutes. [Plaintiff] can
25 occasionally climb ramps or stairs, stoop, kneel, and crouch, but can
26 never climb ladders, ropes, or scaffolds and can never crawl.
27 Overhead work is limited to occasional with unlimited reaching in all
28 other directions. [Plaintiff] must avoid concentrated or excessive
exposure to heavy equipment, heavy vibration and unprotected

1 heights. [Plaintiff] also requires the occasional use of an assistive
2 device (cane) for ambulation.

3 Tr. 33.

4 At step four, the ALJ found Plaintiff could perform his past relevant work as
5 a disc jockey and announcer. Tr. 41. The ALJ thus concluded Plaintiff was not
6 disabled within the meaning of the Social Security Act at any time from January
7 23, 2002, through the date of the ALJ's decision. Tr. 41-42.

8 ISSUES

9 The question presented is whether substantial evidence supports the ALJ's
10 decision denying benefits and, if so, whether that decision is based on proper legal
11 standards. Plaintiff contends the ALJ erred (1) by finding Plaintiff lacked
12 credibility regarding the severity of his symptoms, and (2) in evaluating the
13 medical evidence, specifically by failing to give controlling weight to the opinion
14 of Plaintiff's treating physician and by giving greater weight to the testimony of
15 the medical expert.

16 DISCUSSION

17 A. Credibility

18 Plaintiff argues the ALJ erred by finding him less than credible in his
19 symptom reporting. ECF No. 20 at 5-8.

20 It is generally the province of the ALJ to make credibility determinations,
21 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
22 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
23 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
24 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
25 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
26 "General findings are insufficient: rather the ALJ must identify what testimony is
27 not credible and what evidence undermines the claimant's complaints." *Lester*, 81
28 F.3d at 834.

1 The ALJ found Plaintiff not fully credible concerning the intensity,
2 persistence, and limiting effects of his symptoms. Tr. 34, 37. The ALJ found
3 Plaintiff's symptom reporting was not entirely credible because (1) Plaintiff was
4 able to work, and was looking for full time work, during his period of alleged
5 disability, (2) Plaintiff could perform activities of daily living (ADL), including
6 taking care of his son, (3) at times, Plaintiff reported that his pain was decreasing
7 or at least manageable, (4) Plaintiff failed to do his home physical therapy
8 exercises and he was discharged from physical therapy because of missed
9 appointments, (5) one examining physician diagnosed Plaintiff with "probable
10 partial malingering," (6) Plaintiff stopped working for reasons other than his
11 disability, and (7) a written summary of a surveillance video tape made by an
12 investigator for the Washington Department of Labor and Industries (L & I)
13 described Plaintiff performing activities that he claimed his impairments prevented
14 him from doing. Tr. 35-37.

15 **1. Ability to work and seeking additional work**

16 The ALJ's first reason for finding Plaintiff less than credible, i.e., that he
17 was able to work part time and that he sought full time employment despite his
18 impairments, Tr. 35-36, is, in part, a specific, clear, and convincing reason to
19 discount Plaintiff's credibility.

20 The ALJ noted that, over the course of the relevant period, Plaintiff held
21 numerous jobs. Tr. 35-36 (citing Tr. 93, 658, 1122 (announcer for the Spokane
22 Chiefs, a local hockey team, in at least 2008 and 2010); Tr. 509 (worked "a seven-
23 day-a-week schedule" in September 2006); Tr. 559, 632-34 (worked seasonally for
24 the Spokane Indians, a local baseball team, doing music and "sound effects" in
25 2007 and 2008); Tr. 94, 96-97 (disc jockey for Citadel Broadcast Company
26 between approximately 2005 and 2007); Tr. 97, 873 (did two sports radio shows
27 for Protective Communications after leaving Citadel Broadcast Company)). The
28 ALJ did not find that any of these jobs rose to the level of "substantial gainful

1 activity” in the relevant period. Tr. 31. The ALJ also noted that, in at least 2007,
2 Plaintiff was ““looking for full time work.”” Tr. 35 (citing Tr. 565).

3 Generally, the fact that a claimant “tried to work for a short period of time
4 and, because of his impairments, *failed*,” should not be used to discredit the
5 claimant. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007). In fact,
6 evidence that a claimant tried to work and failed may support the claimant’s
7 allegations of disabling pain. *Id.* at 1038. Furthermore, “disability claimants
8 should not be penalized for attempting to lead normal lives in the face of their
9 limitations.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

10 The ALJ partially erred in citing Plaintiff’s work activities to discount
11 Plaintiff’s credibility. During the relevant period, Plaintiff worked for several
12 years as a disc jockey for radio companies and for local sports teams. Although
13 this work seems to have been part time or seasonal, Plaintiff appears to have been
14 able to perform his job duties despite his impairments. *But see* Tr. 58, 230-31, 296
15 (jobs with radio companies accommodated Plaintiff’s inability to lift and attempted
16 to make some ergonomic changes at his job site). Plaintiff’s ability to perform
17 these jobs would tend to indicate that the severity of his impairments is not as
18 serious as he alleges. Furthermore, Plaintiff’s work at the radio companies ended
19 for reasons other than his impairments, as discussed *infra*.

20 Regarding Plaintiff’s announcer work for the Spokane Indians, however,
21 there is substantial evidence that he had to stop working because he was unable to
22 access the announcer booth via stairs and a steep ramp. *See, e.g.*, Tr. 93. The fact
23 that Plaintiff’s impairments prevented him from continuing his announcer job
24 would tend to support his allegations of disabling pain. *Lingenfelter*, 504 F.3d at
25 1038.

26 Furthermore, the ALJ correctly observed that Plaintiff reported looking for
27 work. But, more accurately, Plaintiff was looking for “jobs [that would] allow
28 [his] disability.” Tr. 238. Despite his searching, there is no indication that

1 Plaintiff ever found work that would accommodate his range of impairments.
2 Plaintiff should not be penalized for attempting to find a job he could perform
3 despite his impairments. *Reddick*, 157 F.3d at 722. And the fact that he was
4 unable to find a job that would accommodate his impairments is consistent with his
5 symptom reporting.

6 In conclusion, the ALJ partially erred in finding Plaintiff's ability to work
7 was a reason to discount his credibility. Plaintiff's ability to work in radio and
8 play music at local sports events would generally indicate that his symptoms do not
9 preclude work. But, in the case of job as an announcer job for the Spokane
10 Indians, Plaintiff's impairments seemed to have caused him to stop working.
11 Furthermore, the fact that Plaintiff sought, but could not find, additional work that
12 would accommodate his impairments, is not inconsistent with his symptom
13 reporting and not a reason to discount his testimony.

14 **2. ADL**

15 The ALJ's second reason for finding Plaintiff less than credible, i.e.,
16 Plaintiff's ADL were inconsistent with his alleged impairments, Tr. 35-37, is not a
17 specific, clear, and convincing reason supported by substantial evidence.

18 "[D]aily activities may be grounds for an adverse credibility finding if a
19 claimant is able to spend a substantial part of his day engaged in pursuits involving
20 performance of physical functions that are transferable to a work setting." *Orn v.*
21 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (internal quotation marks omitted). A
22 claimant need not be "utterly incapacitated," however, to be eligible for benefits.
23 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

24 The ALJ found that Plaintiff engaged in various activities that were
25 inconsistent with his testimony of disabling symptoms. Tr. 35-36 (citing Tr. 565
26 (independent with self-care tasks); Tr. 627-28, 632 ("Likes to keep busy," cares for
27 his son and six horses, coaches son's hockey team, and walks for exercise); Tr.
28 238, 242 (cooks for his son, takes son to school, runs errands, looks for work, visits

1 with friends, takes son to football, baseball, and hockey activities); Tr. 489
2 (Plaintiff reported “rodeoing, playing sports, and riding horses” in June 2006); Tr.
3 693 (reported driving son to athletic events in Coeur d’Alene, Idaho)).

4 Substantial evidence does not support finding Plaintiff’s level of activity
5 inconsistent with his testimony. In some instances, the ALJ mischaracterized the
6 extent of Plaintiff’s daily activities. In other instances, the ALJ failed to account
7 for the fact that Plaintiff’s activities caused him increased pain consistent with his
8 symptom reporting.

9 The ALJ cited to a June 24, 2006, report made by Dr. Lim in finding that
10 Plaintiff engaged in rodeo activities, sports, and horseback riding. Tr. 35 (citing
11 Tr. 489). But Dr. Lim’s report specifically states that, on account of Plaintiff’s
12 injuries, he had to “curtail” these activities. Tr. 489. But substantial evidence in
13 the record supports that Plaintiff could no longer engage in these activities or do so
14 only with significant pain. *See, e.g.*, Tr. 239 (Plaintiff reporting that he used to be
15 able to play sports or do activities with his son, but his impairments now prevented
16 him from taking part in such activities); Tr. 552-53 (back pain “provoked” by
17 activities such as sports and playing with his son and one of Plaintiff’s treatment
18 goals was to “be able to play with his son without pain . . . *be able to return to*
19 *riding horses, [and] play sports.*”) (emphasis added); Tr. 557 (Plaintiff “[c]an
20 engage in few of his usual recreational activities due to increased symptoms.”); Tr.
21 628 (Plaintiff “used to be involved in sports including golf, softball, and rodeo, but
22 he cannot participate in these activities now”).

23 The ALJ cited to the fact that Plaintiff was able to take care of six horses.
24 Tr. 36 (citing Tr. 627). But elsewhere in the record Plaintiff reported that he had to
25 stop taking care of the horses in May 2008. Tr. 687.

26 The ALJ noted that Plaintiff can drive for relatively long distances. Tr. 36
27 (citing Tr. 693). But substantial evidence supports that driving generally increases
28 Plaintiff’s pain. *See, e.g.*, Tr. 449 (“any activity including . . . driving . . . will

1 increase his pain”); Tr. 577 (driving son to rodeo events “caused [his pain]
2 symptoms to increase some”); Tr. 840 (increased pain after “taking a long trip . . .
3 to attend a hockey tournament his son was participating in”).

4 The ALJ noted that Plaintiff took care of, and played with, his son. Tr. 36.
5 The record reflects that Plaintiff is actively involved with his son’s sports, but even
6 such things as playing catch or watching his son’s events causes him problems.
7 *See, e.g.*, Tr. 242 (watching events troublesome because “sitting and getting up is a
8 problem”); Tr. 556 (throwing football aggravates pain).

9 Substantial evidence does not support the ALJ’s conclusion that Plaintiff’s
10 ADL are contrary to his symptom reporting. The ALJ cited many activities that
11 Plaintiff reported participating in prior to the onset of his impairments. But there is
12 little evidence that Plaintiff continued to actively engage in these activities since
13 the onset of his impairments. The record substantially reflects that Plaintiff had to
14 stop engaging in these activities altogether or could only engage in them with
15 significant pain. There is little indication that Plaintiff is able to spend a
16 substantial part of his day engaged in pursuits involving performance of physical
17 functions that are transferable to a work setting. *Orn*, 495 F.3d at 639. Thus,
18 citing to Plaintiff’s ADL was not a specific, clear, and convincing reason to
19 undermine Plaintiff’s credibility.

20 **3. Reports of decreased pain and being able to manage pain**

21 The ALJ’s third reason for finding Plaintiff less than credible, i.e., the fact
22 that Plaintiff reported decreased pain and that his pain was manageable, Tr. 35, is
23 not a specific, clear, and convincing reason.

24 Generally, the fact that a condition can be remedied by treatment or
25 medication is a legitimate reason for discrediting a claimant’s testimony. *Warre v.*
26 *Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). But “some
27 improvement does not mean that the person’s impairments no longer seriously
28 affect [the person’s] ability to function in a workplace.” *Holohan v. Massanari*,

1 246 F.3d 1195, 1205 (9th Cir. 2001).

2 The ALJ noted that in September 2007, Plaintiff reported fewer headaches
3 and reduction in pain levels, muscles tightness and tenderness and that in October
4 2007, Plaintiff reported an eighty percent decrease in his symptoms following
5 physical therapy, with a seventy five to eighty percent decrease in headaches. Tr.
6 35, 575, 588.

7 Substantial evidence does not support that Plaintiff's symptoms substantially
8 improved with treatment. Although the ALJ correctly noted that Plaintiff, at times,
9 reported improvement, the record as a whole reflects that Plaintiff's complaints of
10 pain are constant, and that treatment has largely failed to alleviate his pain. *See*,
11 *e.g.*, Tr. 86-89 (Plaintiff testifying that neither cervical nor lumbar surgery
12 improved his back pain); Tr. 489 (after January 2006 car accident, "has been achy,
13 both sharp and dull, knotting, severe pain that is constant"); Tr. 650 (discharged
14 from pain clinic in May 2008 because he could not participate in the program due
15 to being hospitalized for pain); Tr. 657 (increased pain after September 2007); Tr.
16 665-66 (August 2008 emergency room in which Plaintiff reported worsening back
17 pain); Tr. 682 (October 2008 pain clinic evaluation notes "[Plaintiff] not improving
18 with conservative [treatment].").

19 Although Plaintiff, at times, reported improvement of his impairments, these
20 appear to be isolated instances. When viewing the lengthy record as a whole,
21 substantial evidence does not support the ALJ's reasoning that Plaintiff's condition
22 improved, or that his pain decreased, with treatment. Therefore, this was not a
23 specific, clear, and convincing reason to discount Plaintiff's credibility.

24 **4. Non-compliance with physical therapy**

25 The ALJ's fourth reason for finding Plaintiff less than credible, i.e., that he
26 failed to comply with the requirements of his physical therapy regimen, Tr. 35-36,
27 is a specific, clear, and convincing reason to discount Plaintiff's credibility.

28 The ALJ may rely on unexplained or inadequately explained failure to seek

1 treatment or to follow a prescribed course of treatment. *Molina v. Astrue*, 674 F.3d
2 1104, 1113 (9th Cir. 2012).

3 The ALJ correctly noted that Plaintiff reported that he did not always do his
4 home physical therapy exercises and that he was discharged from physical therapy
5 in October 2007 for failing to keep appointments. Tr. 35-36 (citing Tr. 589, 598).
6 The fact that Plaintiff did not fully engage in physical therapy in this instance is
7 inconsistent with his reports of disabling pain.

8 The Court notes, however, that over the course of the relevant period,
9 Plaintiff engaged in “exhaustive” physical therapy. Tr. 599; *see also* Tr. 304
10 (noting Plaintiff commenced physical therapy around just prior to February 2002);
11 Tr. 332-34 (Plaintiff participated in physical therapy on a frequent and regular
12 basis between 2002 and 2004). Plaintiff reported, and multiple medical sources
13 found, that Plaintiff benefited little from physical therapy. *See* Tr. 313 (Plaintiff
14 stating that physical therapy had “plateaued” and was not helping); Tr. 507 (Dr.
15 Becker noting that Plaintiff participated in physical therapy “without great
16 success”); Tr. 561 (Dr. Bliss noting that Plaintiff gets temporary relief from
17 physical and massage therapy, but “his pain comes back”); Tr. 626 (Plaintiff
18 reporting that none of his treatment since his accident in 2002 had been helpful).

19 In conclusion, the ALJ did not err in pointing out that Plaintiff did not fully
20 comply with his physical therapy regimen in October 2007. Thus, this was a
21 specific, clear, and convincing reason to discount Plaintiff’s credibility. *Warre*,
22 439 F.3d at 1006.

23 **5. Malingering diagnosis**

24 Substantial evidence does not support the ALJ’s fifth reason for finding
25 Plaintiff less than credible, i.e., that a physician diagnosed him with potential
26 malingering. Tr. 36.

27 The ALJ noted that David B. Bot, Ph.D., diagnosed Plaintiff with “probable
28 partial malingering” based on Plaintiff’s “symptom magnification” and refusal to

1 cooperate with the examination.” Tr. 36 (citing Tr. 688-89).

2 Dr. Bot performed a psychological evaluation of Plaintiff for purposes of
3 Plaintiff’s workers’ compensation claim in October 2008. Dr. Bot diagnosed
4 Plaintiff with partial malingering based on Plaintiff’s inconsistent statements and
5 general uncooperativeness during the evaluation. Tr. 688. Dr. Bot did not appear
6 to use any psychological testing to determine whether Plaintiff was malingering
7 regarding the severity of his symptoms. In fact, other than Dr. Bot’s mental status
8 exam, he apparently used no psychological testing to evaluate Plaintiff’s mental
9 condition.

10 Substantial evidence does not support Dr. Bot’s malingering diagnosis. To
11 the contrary, substantial evidence in record supports finding that Plaintiff was not
12 malingering throughout the relevant period. *See, e.g.*, Tr. 280 (Plaintiff is
13 “forthright”); Tr. 515 (“[Plaintiff] is motivated . . . [and] highly invested in
14 recovery”); Tr. 575 (Plaintiff is “cooperative and seems dedicated to get back as
15 much function as possible”); Tr. 634 (Plaintiff “demonstrat[ing] valiant effort to
16 continue to participate [in treatment]”); Tr. 834 (Plaintiff “is not making much
17 progress . . . [but] he certainly can’t be faulted for not trying”); Tr. 834 (Plaintiff is
18 “determined” and has “good attitude”); Tr. 840 (“good interest and effort in trying
19 new exercises”); Tr. 1122 (noting Plaintiff has “perseverance [and] inner strength .
20 . . [and] appears to be doing his best.”); Tr. 1129 (Dr. Balek opining Plaintiff not a
21 malingerer).

22 In fact, some sources commented that Plaintiff attempted to hide his pain
23 during treatment. *See, e.g.*, Tr. 198 (Plaintiff described as “[s]oft-spoken, polite,
24 cooperative . . . [e]ven showed some humor -- said he had to keep positive in order
25 to keep going for himself and his son”); Tr. 518 (Dr. Becker commenting that
26 Plaintiff is “normally extremely stoic” and it was atypically for him to show
27 “obvious discomfort”); Tr. 650 (Plaintiff “was distressed by the pain he
28 experienced during the program . . . although it was clear he was making efforts to

1 maintain a positive presentation”).

2 Furthermore, the Court questions Dr. Bot’s conclusion that Plaintiff was
3 magnifying his symptoms due to the fact that Plaintiff had difficulty sitting and
4 walking, but was not demonstrably in pain during a medical evaluation. As the
5 record demonstrates, this behavior is consistent with how Plaintiff reported to his
6 medical providers. *See, e.g.*, Tr. 279-80 (during 2002 emergency room visit,
7 Plaintiff complained of 9/10 pain, but was “appropriate and pleasant throughout
8 [the doctor’s] encounter”); Tr. 362 (during 2005 emergency room visit, Plaintiff
9 appeared “in minimal distress” but rated pain “10/10”); Tr. 868-69 (during 2008
10 emergency room visit, Plaintiff reported “10/10 pain,” but “on presentation, he
11 [was] sitting and looking uncomfortable, but otherwise in no severe acute
12 distress”). The fact that Plaintiff presented similarly to Dr. Bot would tend to
13 indicate that Plaintiff was not simply putting on an act for Dr. Bot.

14 In conclusion, Dr. Bot’s diagnosis of malingering based on a one time
15 evaluation and made without reliance on any objective testing, is contradicted by
16 substantial evidence. As such, Dr. Bot’s malingering diagnosis is not a specific,
17 clear, and convincing reason to discredit Plaintiff.

18 **6. Other reasons for not working**

19 The ALJ’s sixth reason for finding Plaintiff less than credible, i.e., that he
20 stopped working for reasons other than his impairments, Tr. 36-37, is a specific,
21 clear, and convincing reason to discount Plaintiff’s credibility.

22 The ALJ noted that Plaintiff “reported that he was laid-off from [work at
23 Citadel Broadcast Company], not because his impairments prevented him from
24 working, but because ‘he asked for a raise.’” Tr. 36 (quoting Tr. 632); *see also* Tr.
25 244 (Plaintiff reported being “let go” after disagreement with management). The
26 ALJ also cited Dr. Bot’s evaluation where Plaintiff stated he was having trouble
27 finding work because the radio business was “a little shaky,” highly competitive,
28 and increasingly digital. Tr. 36 (citing Tr. 693).

1 The ALJ did not err in citing the fact that Plaintiff stopped working for the
2 radio companies for reasons other than his impairments. *See Bruton v. Massanari*,
3 268 F.3d 824, 828 (9th Cir. 2001) (ALJ properly relied on the fact that claimant
4 left his job because he was laid off, rather than because he was injured, in finding
5 the claimant not entirely credible).

6 **7. Surveillance video**

7 The ALJ's seventh reason for finding Plaintiff less than credible, i.e. that a
8 description of a surveillance video stated that Plaintiff performed activities
9 inconsistent with his alleged abilities, Tr. 35-36, is not a specific, clear, and
10 convincing reason to discount Plaintiff's credibility.

11 In Social Security cases, the admission of a surveillance video of a claimant
12 does not violate due process when the claimant had an opportunity to view the
13 video prior to the hearing and contest its content at the hearing. *Hubbard v.*
14 *Barnhart*, 225 Fed. App'x 721, 723 (9th Cir. 2007); *see also Bagoyan Sulakhyan v.*
15 *Astrue*, 456 Fed. App'x 679, 682 (9th Cir. 2011) (ALJ properly relied on
16 surveillance video to discredit a claimant's testimony that she was in pain all the
17 time and had difficulty moving).

18 The ALJ noted that in August 2008, an investigator for the Washington
19 Department of Labor and Industries videotaped Plaintiff supervising a yard sale.
20 Tr. 36. The video apparently shows Plaintiff standing "bent over" for sixty to
21 ninety minutes, walking (mostly with a cane), and carrying objects weighing 20-40
22 pounds. Tr. 36-37 (citing Tr. 705-06).

23 The Court finds the ALJ's reliance on this description of the surveillance
24 video troubling for several reasons. First, the video itself does not appear to be in
25 the record—only a description of the video written by Drs. Haynes and Harper in
26 their October 2008 evaluation for purposes of Plaintiff's employment benefits.
27 The ALJ did not claim to have seen the video itself. Second, there is no evidence
28 that Plaintiff was ever able to review the video prior to the hearing or contest the

1 contents of the video, failure of which might raise due process concerns. *Hubbard*,
2 225 Fed. App'x at 723; *Bagoyan Sulakhyan*, 456 Fed. App'x at 682. Third, even
3 absent due process issues, the doctors' subjective description of the video could
4 just as well support Plaintiff's symptom reporting. The video apparently showed
5 Plaintiff standing "bent over" and using a walk when walking. The fact that he at
6 times was able to carry certain objects with one hand (while using his cane in the
7 other) does not necessarily mean he was not disabled. *See Fair*, 885 F.2d at 603
8 (claimant need not be "utterly incapacitated" to be eligible for benefits).

9 Given the video's lack of foundation, the potential due process concerns, and
10 the subjective nature of the video description, the undersigned finds that the ALJ
11 legally erred in relying on the description of the surveillance video to undermine
12 Plaintiff's credibility.

13 **8. Conclusion**

14 Nearly all of the reasons given by the ALJ to support her adverse credibility
15 determination are either based on legal error or not supported by substantial
16 evidence. Plaintiff's testimony concerning the severity of his symptoms is
17 especially important in a case such as this where Plaintiff is alleging disability
18 from chronic excessive pain. *See Stewart v. Sullivan*, 881 F.2d 740, 743 (9th Cir.
19 1989) ("[I]f there are objective medical findings which establish a medical
20 impairment that would normally produce *some* amount of pain, but the claimant
21 testifies that she suffers more pain than would be expected ("excess pain"), the
22 ALJ may discount the testimony only by making specific and justifiable findings to
23 support his decision."). Given the pervasiveness of the errors, the Court cannot
24 conclude that the errors were harmless. On remand, the ALJ shall reevaluate
25 Plaintiff's credibility consistent with this opinion.

26 **B. Evaluation of medical evidence**

27 Plaintiff argues that the ALJ erred by giving greater weight to the opinions
28 of the testifying medical expert, George W. Weilepp, M.D., and by rejecting the

1 opinions of Walter Balek, M.D., Plaintiff's treating physician. ECF No. 20 at 2-4,
2 8-9.

3 "In making a determination of disability, the ALJ must develop the record
4 and interpret the medical evidence." *Howard ex. rel. Wolff v. Barnhart*, 341 F.3d
5 1006, 1012 (9th Cir. 2003).

6 In weighing medical source opinions, the ALJ should distinguish between
7 three different types of physicians: (1) treating physicians, who actually treat the
8 claimant; (2) examining physicians, who examine but do not treat the claimant;
9 and, (3) nonexamining physicians who neither treat nor examine the claimant.
10 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a
11 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at
12 631. The ALJ should give more weight to the opinion of an examining physician
13 than to the opinion of a nonexamining physician. *Id.*

14 When a physician's opinion is not contradicted by another physician, the
15 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*
16 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is
17 contradicted by another physician, the ALJ is only required to provide "specific
18 and legitimate reasons" for rejecting the opinion of the first physician. *Murray v.*
19 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

20 In this case, multiple physicians, including examining doctors James M.
21 Hayne, M.D., and George R. Harper, M.D., and reviewing physician Norman
22 Staley, M.D., concluded that Plaintiff's impairments would not prevent him from
23 working with certain limitations. Tr. 400-07, 690-708. Therefore, the ALJ was
24 only required to give specific and legitimate reasons for rejecting any opinion
25 finding that Plaintiff's impairments preclude him from working.

26 **a. Dr. Balek**

27 Dr. Balek was Plaintiff's treating doctor between 1998 and 2010. Tr. 86.
28 Over the course of this period, Dr. Balek treated Plaintiff for back and neck pain

1 and various other ailments. *See, e.g.*, Tr. 498-99, 506, 512-13, 517, 585, 769-86,
2 989-1025 1081-94. Dr. Balek prescribed different combinations of medication,
3 epidural injections, and referred Plaintiff to physical therapists and numerous
4 specialists.

5 In August 2009, Dr. Balek completed disability paperwork for Plaintiff's
6 application for state benefits. Tr. 1063-68. Dr. Balek opined that Plaintiff was
7 capable of sedentary work, but that Plaintiff was unable to bend, lift, or climb and
8 had some limitations walking and standing and would not be able to sit for
9 prolonged periods of time. Tr. 1063.

10 In June 2010, Dr. Balek completed a RFC questionnaire in which he opined
11 that Plaintiff's prognosis was "guarded." Tr. 1128. Dr. Balek stated that Plaintiff
12 suffers from anxiety and depression. Tr. 1129. Dr. Balek opined that Plaintiff
13 could walk less than a block and could sit and stand for fifteen minutes at a time
14 before needing to change positions. Tr. 1129. Dr. Balek opined that Plaintiff
15 could sit for about two hours, and stand for less than two hours, in an eight-hour
16 work day. Tr. 1130. Dr. Balek assessed numerous other functional limitations
17 regarding Plaintiff's ability to lift, bend, and perform other movements. Tr. 1130-
18 31. Dr. Balek opined that Plaintiff would likely miss four days of work a month on
19 account of his impairments. Tr. 1131.

20 The ALJ incorporated Dr. Balek's assessments from the 2009 evaluation
21 into her RFC determination. Tr. 39, 1063-68. But the ALJ gave little weight to
22 Dr. Balek's 2010 RFC questionnaire. Tr. 40, 1128-31. The ALJ reasoned that (1)
23 Dr. Balek provided little explanation as to how he reached his conclusions, and (2)
24 the limitations assessed by Dr. Balek were inconsistent with the treatment record as
25 a whole and inconsistent with his own earlier opinion that Plaintiff was capable of
26 sedentary work. Tr. 40.

27 Regarding Dr. Balek's 2009 assessment, Plaintiff does not argue that that it
28 was error to credit Dr. Balek's opinion when formulating Plaintiff's RFC.

1 Regarding Dr. Balek's answers contained in the June 2010 RFC questionnaire, the
2 ALJ provided specific and legitimate reasons for giving the opinions little weight.
3 An ALJ "need not accept the opinion of any physician, including a treating
4 physician, if that opinion is brief, conclusory, and inadequately supported by
5 clinical findings." *Thomas*, 278 F.3d at 957. Even though Dr. Balek treated
6 Plaintiff for over a decade, his treatment notes do not appear to provide clinical
7 findings that would directly support the limitations he assessed in the 2010 RFC
8 questionnaire. Furthermore, inconsistency with the medical evidence can also be a
9 legitimate reason for rejecting a medical opinion. *Batson*, 359 F.3d at 1196. As
10 pointed out by the ALJ, Dr. Balek's answers to the 2010 RFC questionnaire are
11 inconsistent with the medical evidence, including the examination performed by
12 Drs. Haynes and Harper in October 2008, Tr. 690-708, and Dr. Balek's 2009
13 assessment, Tr. 1063-68, both records which conclude that Plaintiff is capable of
14 sedentary work. The ALJ provided specific and legitimate reasons for giving little
15 weight to Dr. Balek's answers contained in the 2010 RFC questionnaire.

16 However, the Court determined *supra* that the errors contained in the ALJ's
17 adverse credibility finding require remand for further proceedings. If, on remand,
18 the ALJ credits Plaintiff's subjective complaints, the ALJ may also need to
19 reevaluate Dr. Balek's opinions, including Dr. Balek's treatment notes which seem
20 to support Plaintiff's reporting of excess, chronic pain, and the ineffectiveness of
21 treatment, over the course of many years. Furthermore, Plaintiff seems to be
22 alleging that his condition is deteriorating. As Dr. Balek completed the 2010 RFC
23 questionnaire approximately ten months after his 2009 assessment, it is possible
24 Dr. Balek's 2010 assessment reflects Plaintiff's worsening condition. To
25 determine Plaintiff's current level of functioning, the Court will also require the
26 ALJ to direct Plaintiff to undergo a new consultative physical examination. The
27 ALJ should reevaluate Dr. Balek's answers contained in the 2010 RFC
28 questionnaire in light of the new consultative physical examination.

b. George W. Weilepp, M.D.

Dr. Weilepp testified at the hearing as an impartial medical expert. Dr. Weilepp questioned Plaintiff about his work during the relevant period. Tr. 57-59. Dr. Weilepp then summarized Plaintiff's medical history, assessed Plaintiff with numerous exertional limitations, and concluded that Plaintiff would be capable of "highly restrictive light/sedentary activity." Tr. 61-63. Dr. Weilepp opined that pain is "a major problem" for Plaintiff, but that narcotic pain medication reasonably controls Plaintiff's pain because Plaintiff wouldn't take the medication if it didn't help. Tr. 66. Dr. Weilepp disagreed with Dr. Balek's findings that Plaintiff was not capable of bending, lifting, or climbing and had some limitations walking and sitting. Tr. 67-68. Dr. Weilepp stated that objective evidence did not support these limitations. Tr. 68. Dr. Weilepp opined that the fibrosis or scarring surrounding Plaintiff's S1 nerve root could be a cause of Plaintiff's pain. Tr. 78.

The ALJ gave significant weight to Dr. Weilepp's opinions "due to his medical expertise, his familiarity with the Social Security regulations and the consistency of [his] testimony with the medical history, objective medical findings, and other medical opinions contained in the record." Tr. 40.

Plaintiff argues that Dr. Weilepp failed to take into account Plaintiff's chronic pain in determining Plaintiff's RFC and that Dr. Weilepp's opinion that narcotic pain medication controls Plaintiff's symptoms is unfounded. ECF No. 20 at 8-9. After reviewing Dr. Weilepp's testimony, the Court agrees that Dr. Weilepp did not account for the level of impairment caused by chronic pain described by Plaintiff. The Court concluded *supra* that the ALJ erred in finding Plaintiff's symptom reporting less than credible. If, on remand, the ALJ credits Plaintiff's subjective reporting, the ALJ will also need to reevaluate the opinions of Dr. Weilepp or elicit additional opinions from an impartial medical expert. The ALJ should also reconsider the extent to which Plaintiff's pain medication alleviates his symptoms and affects his ability to work.

REMEDY

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAlliser v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. Further proceedings are necessary for the ALJ to determine Plaintiff’s credibility regarding his symptom reporting, especially his testimony concerning the limitations caused by his chronic pain. Upon reevaluating Plaintiff’s credibility, the ALJ will also need to supplement the record, reconsider the medical evidence, and, if necessary, determine the disability onset date.

CONCLUSION

Having reviewed the record and the ALJ’s findings, the Court finds the ALJ’s decision is not supported by substantial evidence and based, in part, on legal error. On remand, the ALJ shall direct Plaintiff to undergo a new consultative

1 physical examination. At the new administrative hearing, the ALJ, if warranted,
2 shall elicit the testimony of a medical expert to assist the ALJ in formulating a new
3 RFC determination. The ALJ shall present the new RFC assessment to a VE to
4 help determine if Plaintiff is capable of performing any other work existing in
5 sufficient numbers in the national economy. Furthermore, the Court notes that the
6 ALJ may be acquainted with some of the individuals involved in this matter. *See*
7 Tr. 272-74. Even though the ALJ has shown no bias, in an abundance of caution,
8 the Court recommends that the matter be assigned to a different ALJ on remand.
9 *See Reed v. Massanari*, 270 F.3d 838, 845 (9th Cir. 2001) (remanding to new ALJ
10 even absent evidence of bias).

11 Accordingly, **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 21**, is
13 **DENIED**.

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 20**, is
15 **GRANTED, in part**.

16 3. Application for attorney fees may be filed by separate motion.

17 The District Court Executive is directed to file this Order and provide a copy
18 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
19 **and the file shall be CLOSED**.

20 DATED June 5, 2015.



A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE